No. 95-813

In the

Supreme Court of the United States

October Term, 1995

BRAD BENNETT, et al.,
Petitioners,

v.

MARVIN L. PLENERT, et al.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CALIFORNIA CATTLEMEN'S ASSOCIATION, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, THE CATL FUND, AND POSSEE IN SUPPORT OF PETITIONERS

OF COUNSEL
MARK T. GALLAGHER
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888

ROBIN L. RIVETT
*M. REED HOPPER
*Counsel of Record
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Amici Curiae

QUESTIONS PRESENTED FOR REVIEW

Under the citizen suit provision of the Endangered Species Act of 1973 (16 U.S.C. § 1540(g)(1)) "any person" may commence a civil suit on his own behalf to enjoin the United States from violating the provisions of the Act or regulations issued thereunder. The questions presented are:

1. Whether the broad standing mandated by Congress in the citizen suit provision of the Endangered Species Act is subject to a zone of interest test as a further, judicially imposed prudential limitation on standing.

2. If standing to sue under the Endangered Species Act is subject to prudential limitations, whether those limitations permit only environmental plaintiffs to challenge government conduct alleged to violate the terms of the Act or whether the claims of economic injury raised by public water suppliers and water users are also within the zone of interests protected or regulated by the Act.

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

No. 95-813

In the
Supreme Court of the United States
October Term, 1995

BRAD BENNETT, et al.,
Petitioners

v.

MARVIN L. PLENERT, et al.,
Respondents

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CALIFORNIA CATTLEMEN'S ASSOCIATION, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, THE CATL FUND, AND POSSEE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae on behalf of itself, the California Cattlemen's

Association, the National Cattlemen's Beef Association, the CATL Fund, and POSSEE. Written permission from all parties to file this brief has been lodged with the Clerk of the Court.

The California Cattlemen's Association (CCA) is a nonprofit corporation. CCA was founded in 1917 and represents the state's beef cattle industry in legislative and regulatory affairs. Beef cattle producers operate on over 40 million of California's 100 million acres of land and contribute more than $1.5 billion to the state's economy. The beef industry provides more than 26,000 jobs in the State of California.

The National Cattlemen's Beef Association (NCBA) was created by the consolidation of the National Cattlemen's Association and the National Livestock and Meat Board/Beef Industry Council. NCBA is the national spokesperson and issues manager for all segments of the United States beef cattle industry. The NCBA represents more than 230,000 professional cattle breeders, producers, and feeders, as well as 75 affiliated state and national associations. It is the only national grassroots organization that articulates policies on behalf of the single largest holder of private property in America--the beef cattle industry. Sixteen percent of the land mass of the United States is privately owned by ranchers--approximately 371 million acres (larger than the collective size of 22 states). Through the NCBA, cattlemen work to create positive business conditions and to maintain the land from which they make their living while providing consumers with the finest beef in the world.

The CATL Fund was created to assist landowners and others similarly situated, including cattlemen, in establishing broad-based legal precedent to protect property rights, promote free enterprise, and minimize regulatory abuses. Because ranchers own or use such vast tracts of land, they are disproportionately singled out to bear the burden of

habitat preservation. Collectively, ranchers may own more endangered species habitat than any other class of Americans. Accordingly, the greatest part of the burden associated with species protection necessarily falls upon ranchers and other private landowners.

POSSEE (Protecting Our State's Stewards, Environment, and Economy) is a public interest legal fund organized to help ranchers, farmers, and other landowners who depend on California's renewable resources for their livelihood. Protecting the delicate balance between a healthy environment and a healthy economy for these stewards is the primary goal of the legal fund.

Pacific Legal Foundation is a nonprofit, tax-exempt organization incorporated under the laws of California for the purpose of participating nationally in litigation matters affecting the public interest. PLF has over 20,000 supporters nationwide. PLF policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. The Board of Trustees evaluates the merits of any contemplated legal action and authorizes such action only where PLF's position has broad support within the general community. PLF's Board of Trustees has authorized the filing of a brief amicus curiae in this matter. PLF has a long-standing interest in environmental issues and has participated in numerous cases involving statutory interpretation of environmental laws, including the Endangered Species Act, 16 U.S.C. § 1531, *et seq.*

For example, PLF was a party of record in *Pacific Legal Foundation v. Andrus*, 657 F.2d 829 (6th Cir. 1981), and amicus curiae in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, ___ U.S. ___, 115 S. Ct. 2407 (1995); *Douglas County, Oregon v. Babbitt*, Case No. 95-371; and *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) (*TVA*). PLF also litigated the case of *Gonzales v. Gorsuch*, 688 F.2d 1263 (9th Cir. 1982), which

involved standing under the Clean Water Act's citizen-suit provision.

Similar to the Clean Water Act, the citizen-suit provision of the Endangered Species Act (ESA or Act) provides "any person may commence a civil suit on his own behalf" to enjoin the government from violating the Act. 16 U.S.C. § 1540(g)(1). Despite the sweeping "any person" language used by Congress in this provision, the court below held only those plaintiffs have standing to sue who assert an interest in the preservation of species and, therefore, lie within the "zone of interests" protected by the ESA. *Bennett v. Plenert*, 63 F.3d 615, 619 (9th Cir. 1995). The questions presented by this case are twofold: (1) whether the Ninth Circuit was correct in applying the zone of interests test to an ESA citizen suit and (2) whether economic interests are within the zone of interests protected by the ESA.

These questions are vital to millions of Americans. As of 1995, over 900 species had been listed as threatened or endangered under the federal Endangered Species Act with over 3,000 species under consideration for listing. Developer's Guide to Endangered Species Regulation at 7 (1996). These species range from insects to mammals and are found throughout the United States. Also, many states have adopted their own endangered species acts, patterned after the federal ESA, to provide further protections to species within their borders. This has resulted in hundreds of actual and potential additional state listings.

As this Court stated in *TVA v. Hill*, 437 U.S. at 179, the Act is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." The heart of this comprehensive legislation is habitat protection. In *Babbitt v. Sweet Home*, this Court noted among the Act's central purposes is "to provide a means whereby the ecosystems upon which endangered

species and threatened species depend may be conserved ....." 16 U.S.C. § 1531(b). The resultant limitations on land and water use potentially affect millions of Americans. However, the lower court decision in this case effectively bars the courthouse doors to those who must bear the burden of species preservation and, therefore, have the greatest incentive to ensure government compliance with the Act.

PLF believes its public policy perspective and litigation experience in support of rational environmental protection and economic rights will provide a necessary additional viewpoint on the issues presented in this case.

STATEMENT OF THE CASE

The petitioners in this case are two ranchers and two irrigation districts in the State of Oregon that use the water from the Klamath Project for commercial and recreational purposes. The project is operated by the United States Bureau of Reclamation (Bureau). In 1992, the Bureau became concerned that the operation of the Klamath Project may harm two species of fish listed as endangered under the ESA; the Lost River sucker and the shortnose sucker. The Bureau contacted the United States Fish and Wildlife Service (FWS) to determine whether the two species of fish would be put at risk by ongoing operation of the project. FWS prepared a biological opinion which concluded "long term operation of the Klamath Project was likely to jeopardize the continued existence of the Lost River and shortnose suckers." *Bennett*, 63 F.3d at 916. Among the mitigation measures recommended to the Bureau by FWS in its opinion was that the Bureau maintain minimum water levels in the Clear Lake and Gerber Reservoirs. This would restrict water diversions by petitioners for irrigation purposes. The Bureau informed FWS it intended to comply with this recommendation.

Petitioners filed suit in the United States District Court for the District of Oregon under the ESA's citizen-suit provision, 16 U.S.C. § 1540(g)(1). Petitioners' complaint alleged there was no evidence to support FWS' determination that the sucker fish were jeopardized by the operation of the Klamath Project. To the contrary, according to petitioners, the two species of fish were reproducing successfully and, thus, were not in need of federal intervention. More specifically, the complaint charged FWS had not complied with the consultation provisions of Section 1536(a) and had failed to consider economic and other impacts of its opinion in violation of Section 1533(b)(2) and the National Environmental Policy Act (NEPA). In an unpublished opinion, the District Court concluded petitioners lacked standing to challenge the FWS determination and dismissed their suit.

On appeal, the Ninth Circuit concurred with the District Court and ruled only those plaintiffs "who allege an interest in the *preservation* of endangered species fall within the zone of interests protected by the ESA" and have standing to sue. *Bennett*, 63 F.3d at 919 (emphasis in original).[1] In so ruling, the lower court rejected the Eighth Circuit's interpretation of the Act that the ESA's broad citizen-suit provision "necessarily abrogated any zone of interests test." *Id.* at 918 n.3. According to the Ninth

[1] The Ninth Circuit only addressed the issue of whether petitioners were within the zone of interests protected by the ESA and did not determine whether they had satisfied the constitutionally based standing requirements. *Bennett v. Plenert*, 63 F.3d at 917.

Circuit, because the ESA is "singularly devoted to the goal of ensuring species preservation," plaintiffs alleging solely an economic or recreational interest do not have standing to challenge government violations of the Act. *Id.* at 920.

For the reasons stated below, amici Pacific Legal Foundation, NCBA, CCA, CATL FUND, and POSSEE, support petitioners request that this Court overturn the decision of the Ninth Circuit Court of Appeals, wherein that court applied the zone of interests test in an ESA citizen suit and found only species preservation was a protected interest.

SUMMARY OF ARGUMENT

This Court established that "[c]ongress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one 'who otherwise would be barred by prudential standing rules.'" *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). To the ESA, Congress engrafted a citizen-suit provision that allows "any person" to commence a civil suit against the federal government for alleged violation of the Act. 16 U.S.C. § 1540(g)(1). Applying the cannon of statutory construction that the best evidence of congressional intent is the language used in the statute, it becomes clear that Congress intended to waive the prudential zone of interests requirement in suits filed pursuant to the ESA.

In its application of the zone of interests test, the Ninth Circuit was wrong to exclude petitioners' economic interests. Certain provisions of the Act, including those which form the basis of the complaint, evidence an express intent of Congress to protect such interests, including a mandate that the government consider economic and other relevant impacts of any critical habitat designation and that proposed project alternatives be "reasonable and prudent." Moreover, allowing petitioners to sue to vindicate their nonenvironmental interests would not frustrate the purposes of the ESA. To the contrary, Congress had some purpose in enacting an expansive citizen-suit provision. It may have been of the opinion that one likely to be economically injured by species protection programs would be the only person having a sufficient interest to bring to the attention of the courts errors of law committed by the government in implementing the Act. It is within the power of Congress to confer such standing within the limits of Article III.

Even if petitioners' claims do not fall within the zone of interests protected by the ESA, petitioners still have standing to sue. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (*Defenders*), this Court recognized the existence of a procedural right of action. Among other procedural rights, the ESA declares that "[f]ederal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species." 16 U.S.C. § 1531(c)(2). With respect to petitioner irrigation districts, this was not done. For all of these reasons, petitioners have standing to sue.

ARGUMENT

I

IN UNMISTAKABLE LANGUAGE, CONGRESS CLEARLY WAIVED PRUDENTIAL STANDING REQUIREMENTS UNDER THE ESA

The court below held:

> In sum, the fact that a statute contains a citizen-suit provision does not necessarily establish that Congress intended that any particular plaintiff have standing to assert a violation.

Bennett, 63 F.3d at 919.

This statement misses the point. It is not the existence of a citizen-suit provision which decides the issue but rather the nature of that provision. The citizen-suit provision in the ESA is clear and unambiguous. It states, in pertinent part:

> (g) Citizen suits
>
> (1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf--
>
> (A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation

> of any provision of this chapter or regulation issued under the authority thereof .....

16 U.S.C. § 1540(g)(1).

The operative language is not "citizen suits" but "any person." Unless otherwise defined in the statute, and within constitutional limits, the congressional use of "any person" language in a citizen-suit provision should be deemed a waiver of all prudential standing requirements as a matter of law. It cannot be assumed that Congress did not intend what it plainly said when it adopted such language.

It should be evident that the scope of citizen-suit provisions in our environmental statutes has been the subject of vigorous litigation for decades, including the Clean Water Act, Clean Air Act, Resource Conservation and Recovery Act, Comprehensive Environmental Response, Compensation and Liability Act and, hopefully, ending with the Endangered Species Act in this case. As this case demonstrates, judicial interpretation of standing under citizen-suit provisions often results in conflicting decisions and substantial uncertainty for the regulated community. For the most part, it is unnecessary.

Justice demands that the legislative, executive, and judicial branches of government be put on notice that unless the term is specifically defined to exclude certain persons, and subject only to Article III minima, "any person" in a citizen suit provision means any person. Short of enumerating all possible plaintiffs under a citizen-suit provision, which may also be subject to interpretation, Congress could not state its intent with any greater clarity or with less equivocation than it has in the ESA. The term "any person" brooks no dispute. The lower court questioned and then rejected the plain meaning of so simple a statement

because of what it, not Congress, deemed the higher purposes of the Act.

In *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, this Court held:

> Congress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one "who otherwise would be barred by prudential standing rules." In no event, however, may Congress abrogate the Art. III minima: A plaintiff must always have suffered a "distinct and palpable injury to himself," that is likely to be redressed if the requested relief is granted.

Id. at 100 (citations omitted).

The Ninth Circuit acknowledged this Court's holding in *Gladstone*, but the court clearly did not believe it.

> [N]otwithstanding the broad language of the citizen-suit provision, we directly reject the plaintiffs' contention that it renders the zone of interests test inapplicable to claims brought under the ESA. Our conclusion follows from the fact that our court, and others, have regularly employed the zone of interests test in determining standing despite Congress' enactment of expansive citizen-suit provisions.

Bennett, 63 F.3d at 918.

If this Court's holding in *Gladstone* is to have any meaning, Congress must, at some point, be deemed to have

expressed its intent to "expand standing to the full extent permitted by Article III." If "any person" is not such an expression, what is?

The attempt by the Ninth Circuit to go behind the plain language of the ESA citizen-suit provision and somehow divine, through the statutory scheme, whether Congress intended to preclude any particular class of persons from seeking judicial review is a subterfuge to escape the clearly stated will of Congress. If the scope of judicial review is determined not from the clear and unambiguous language of a statute, but rather from judicial perception of the implicit intent of Congress, it is the courts and not Congress that may contract or expand standing. The Ninth Circuit had no difficulty understanding the express language of the ESA, the court simply disagreed with it. The Ninth Circuit itself decided to limit judicial review and so ignored the citizen-suit provision altogether. This is apparent from the fact that the lower court interpreted the standing requirement under the ESA in exactly the way it interpreted the standing requirement under NEPA.

> Similarly, we held that plaintiffs do not have standing under NEPA to protect "purely" economic interests, because the environmental purposes of the Act would not be furthered by permitting suits premised on such interests. See *Nevada Land Action Ass'n v. U.S. Forest Service*, 8 F.3d 713, 716 (9th Cir. 1993).

Bennett, 63 F.3d at 919-20.

However, contrary to the ESA, NEPA has no citizen-suit provision. Clearly, Congress intended the ESA citizen-suit provision to mean something. In the Ninth Circuit, it means nothing. The lower court's ruling in this case would

have been the same without the citizen-suit provision. Likewise, this Court intended *Gladstone* to mean something. In the Ninth Circuit, it means nothing. If the "any person" language will not preclude the zone of interests test under *Gladstone*, virtually no language will do so.

II

A BROAD INTERPRETATION OF THE CITIZEN-SUIT PROVISION WILL ADVANCE, NOT FRUSTRATE, THE PURPOSES OF THE ESA

The lower court's rejection of petitioners' suit by the strict application of the zone of interests test turned on the court's grave concern that

> [t]o interpret the statute in the manner suggested by plaintiffs would be to transform provisions designed to further species protection into the means to frustrate that very goal.

Bennett, 63 F.3d at 922.

This concern is misplaced. Surely, Congress knew it was creating the most comprehensive and, arguably, the most intrusive environmental legislation in the world. *See TVA v. Hill*, 437 U.S. at 176. Species preservation would necessarily require severe and long-lasting land and water use restrictions. For that reason, the Act requires both species status and critical habitat determinations to be made on the best scientific data available. 16 U.S.C. § 1533(b)(1) and (2). It therefore furthers, rather than frustrates, the intent of the ESA to allow citizen suits to enforce strict adherence to sound biological principles.

In the present case, petitioners assert FWS did not rely on the best scientific data available and so rendered a faulty biological opinion. Nothing could frustrate the purposes of the ESA, and undermine public confidence in the Act, more than faulty biological decisions. Such decisions are not easily reversed. Moreover, if, as the lower court believes, the ESA requires species protection "whatever the cost," it follows that our finite resources should only be brought to bear when it is biologically necessary to provide such protection. Unnecessary diversion of natural resources, in this case water flows for two thriving fish species, is both wasteful and counterproductive. Surely, this does not advance the goals of the Act.

The determination of who may bring a suit under the ESA should be left to Congress, not the judiciary. Unrestrained species preservation is not the purpose of the ESA as the Ninth Circuit supposes. ("The overall purposes of the ESA are singularly devoted to the goal of ensuring species preservation ...." *Bennett*, 63 F.3d at 920). Rather, well-founded, scientifically based species preservation is the purpose of the ESA. ("The Secretary shall make [listing] determinations ... and designate critical habitat ... on the basis of the best scientific data available ...." 16 U.S.C. § 1533(b).) Most certainly, Congress intended to assure adherence to this high standard when it granted, in the most unambiguous language imaginable, the right of any person to bring a suit against the government for failing to comply with the statute.

Those parties who fall within the zone of interests of the ESA, as defined by the Ninth Circuit (*i.e.*, those who allege an interest in the preservation of species), have a far greater incentive to see that species are favored than to ensure proper legal or even scientific protocols are followed. In contrast, those parties the Ninth Circuit has determined

fall outside the zone of interests of the ESA (*i.e.*, those who allege economic concerns) bear the actual burden of species preservation and have a vested interest to see that both the spirit and letter of the law are followed.

This Court acknowledged the value of enforcement by those with interests ostensibly averse to the general purpose of a statute in *Sierra Club v. Morton*, 405 U.S. 727 (1972). In *Sierra Club*, this Court cited with favor *Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940), for the following:

> Congress had some purpose in enacting section 402(b)(2). It may have been of opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license. It is within the power of Congress to confer such standing to prosecute an appeal.

Id. at 477.

Title 47, United States Code 402(b)(2), referred to a broad citizen-suit provision of the Communications Act of 1934 that provided for an appeal to the Court of Appeals of the District of Columbia (1) by an applicant for a license or permit, or (2) by any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application. *Id.* at 476-77. In *Sanders*, petitioner argued, much like the Ninth Circuit in the present case, that since economic injury to the respondent was not a proper issue before the Commission, "it is impossible that section 402(b) was

intended to give the respondent standing to appeal." *Id.* at 477. However, to ensure a check on the actions of the licensing commission, this Court found that a competitor had standing to protect economic interests and held the government's view "would deprive subsection (2) of any substantial effect." *Id.* at 477. So it is in this case; those with economic interests are virtually the only persons having a sufficient interest to bring to the attention of the courts errors of law in the Secretary's implementation of the ESA.

The ESA citizen-suit provision should be interpreted not grudgingly but as serving a broadly remedial purpose. There is a greater public interest in ensuring compliance with the Act than in limiting access to the courts. An unwarranted listing of a species or unnecessary mitigation does not advance the interests of the Act or the American people.

III

ECONOMIC INTERESTS ARE AMONG THOSE INTERESTS PROTECTED BY THE ESA

The court below held the overall purposes of the ESA are singularly devoted to the goal of ensuring species preservation and that the Act does not embrace or protect economic interests. *Bennett*, 63 F.3d at 920. This holding is incorrect. The Ninth Circuit based this holding on this Court's decision in *TVA v. Hill* wherein this Court concluded:

> The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. That is reflected not only in the stated policies

> of the Act, but in literally every section of the statute.

TVA v. Hill, 437 U.S. at 184.

If that was true of the ESA then, it certainly is not true today. This Court decided *TVA v. Hill* in June of 1978. In November of the same year, the Act was amended by Congress for the express purpose of requiring a consideration of costs and other impacts in species protection. Congress amended Section 4 (16 U.S.C. § 1533) of the Act to direct that

> [i]n determining the critical habitat of any endangered or threatened species, the Secretary shall consider the economic impact, and any other relevant impacts, of specifying any particular area as critical habitat, and he may exclude any such area from the critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species.

Endangered Species Act of Nov. 10, 1978, Pub. L. No. 95-632, 1978 U.S.C.C.A.N. (92 Stat.) 366.

This amendment speaks for itself; the Secretary is to consider, and therefore protect, economic and other interests in habitat designations. The legislative history also supports this plain reading of the text. In House debates, the amendment's author, Representative Leggett, stated:

> The Endangered Species Act has been criticized because it allows for no consideration of the economic impact of listing a species or designating critica' habitat. Although H.R. 14104 retains the Act's stringent mandate, it does introduce a consideration of economic impact in several respects .... [T]he bill includes a provision which requires the Secretary to evaluate the economic impact of designating critical habitat ....

124 Cong. Rec. 38,134 (1978) (statement of Rep. Leggett).

In 1978, Congress also amended Section 7 of the ESA to require the Secretary to suggest "reasonable and prudent alternatives" for a federal project the Secretary determined, after consultation, may cause jeopardy to a listed species. 16 U.S.C. § 1536(b)(3)(A). Use of the term "reasonable and prudent" suggests a congressional intent that the Secretary weigh competing economic and other interests in rendering a biological opinion just as the Secretary is required to do in designating critical habitat.

Congress did not stop there, however. In 1982, Congress again amended the ESA in an attempt to provide more economic protection under the Act. The most significant amendments added in 1982 created an exemption process to the ESA's taking prohibition which one commentator noted, "is the principle way in which economic considerations are intended to factor into application of the ESA." Ike Sugg, *Caught in the Act: Evaluating the Endangered Species Act, Its Effects on Man and Prospects for Reform*, 24 CUMB. L. REV. 1, 37 (1993). The exemption process created the Endangered Species Committee, which is allowed to circumvent the strict takings prohibitions of the

ESA if such action is found to be in the public interest. 16 U.S.C. § 1536.

The 1982 amendments also offered relief to private property owners and other persons that might otherwise be adversely affected by strict compliance with the ESA's provisions. The amendments allowed for the "incidental" taking of a listed species. 16 U.S.C. § 1539(a)(1)(B). An incidental taking is the taking of a species that occurs as the by-product "of carrying out an otherwise lawful activity." *Id.* With the Secretary's permission, such incidental takings are not considered a violation of the ESA. The legislative history behind this provision provides clear evidence of what Congress intended:

> The legislation establishes a procedure whereby those persons whose actions may affect endangered or threatened species may receive permits for the incidental taking of such species, provided the action would not jeopardize the continued existence of the species. *The provision addresses the concerns of private landowners* who are faced with having otherwise lawful actions not requiring Federal permits prevented by Section 9 prohibitions against taking.

H.R. Rep. No. 567, 97th Cong., 2nd Sess. (1982) (emphasis added).

Obviously, Congress recognized that the interests of landowners may conflict with the goal of conservation. Rather than adopt a hard and fast rule against the "taking" of a species, Congress instead chose to steer a middle course between these two competing interests and adopted this

balancing approach to the problem. Thus, economics and reasonable property uses were made protectable interests under the ESA.

This balancing approach is also found in the ESA amendments allowing for hardship exemptions. 16 U.S.C. § 1539(b). If the listing of a species will cause undue economic hardship to an individual who has entered into a commercial contract regarding that species, the Secretary may exempt that individual from the application of the ESA. *Id.* In addition, this subsection makes special allowances for natives of Alaska, provided the taking is "primarily for subsistence purposes." 16 U.S.C. § 1539(e)(B). Congress understood that many legitimate and important economic human activities could be severely affected by an unbridled attempt to preserve species, so it sought to provide countervailing protections by amending the Act. The reasoning employed by the Ninth Circuit in this case fails to recognize Congress' attempt to protect and preserve economic interests.

Any doubt as to the intent behind the 1982 amendments vanishes upon reading the legislative history supporting those amendments. The House Report accompanying the 1982 amendments details the goals sought to be achieved by the Act:

> The Endangered Species Preservation Act of 1966 and the Endangered Species Conservation Act of 1969 preceded the 1973 Act to address the same problem, but it was the last statute which constructed a

> comprehensive means to *balance economic growth and development with adequate conservation measures.*

H.R. Rep. No. 567, 97th Cong., 2nd Sess. (1982) (emphasis added).

The legislative history also traces the evolution of the ESA from 1973 through 1982:

> Subsequent to its passage, the Act was amended in 1976, 1978 and 1979 to increase the *flexibility in balancing species protection and conservation with development projects.*

Id. (emphasis added).

Economic protection under the ESA reached its zenith with the 1982 amendments. The provisions added in that year, as well as the legislative history explaining those provisions, demonstrate beyond all doubt that economic interests are within the zone of interests protected and regulated by the ESA.

The Ninth Circuit's cavalier rejection of petitioners' economic interests as protectable interests under the ESA is untenable. In amending the Act to include economic and other considerations, Congress was obviously responding to public and judicial perception that the ESA required species protection "whatever the cost." These amendments were designed to change that perception by changing the Act. These, and other, provisions simply do not permit the interpretation given the Act by the Ninth Circuit that the overall purposes of the ESA "do not embrace the economic and recreational interests that underlie the plaintiffs'

challenge." *Bennett*, 63 F.3d at 920. The Act was modified expressly to embrace such interests.

IV

PETITIONERS HAVE STANDING TO SUE UNDER THE PARTICULAR STATUTORY PROVISIONS WHICH UNDERLIE THEIR COMPLAINT

Even if the language of the ESA, as amended, is not enough to bring petitioners within the "zone of interests" of the Act as a whole, petitioners would still have standing to sue under the habitat designation and biological consultation provisions on which their claims rest. In its decision below, the Ninth Circuit cited this Court's holding in *Clarke v. Securities Industry Association*, 479 U.S. 388 (1987), for the following:

> *Clarke* explains that the zone of interests test simply provides a method of determining whether Congress intended to permit a particular plaintiff to bring an action. As the *Clarke* Court made clear, "at bottom the reviewability question turns on congressional intent, and all indicators helpful in discerning that intent must be weighed." Thus *Clarke* concludes that the statutory purposes should be devined by considering the particular statutory provision that underlies the complaint within "the overall context" of the act itself.

Bennett, 63 F.3d at 918 (citation omitted).

In *Lujan v. National Wildlife Federation*, 497 U.S. 871, this Court expressed the *Clarke* standard of review this way:

> [W]e have said ... the plaintiff must establish that the injury he complains of ... falls within the "zone of interests" sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.

Id. at 883.

The Ninth Circuit departed from this standard in that it focused on the "overall context" of the Act to the exclusion of the particular statutory provisions that underlie the complaint. As basis for this suit, plaintiffs claim FWS violated Subsection 1533(b)(2), which incorporates the amended congressional mandate that the Secretary designate critical habitat "after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." Petitioners also claim FWS violated 16 U.S.C. § 1536 in rendering a faulty biological opinion and suggesting unjustified alternatives to the federal project.

As discussed in the previous argument, the express language of these sections, the intent of the author, and the circumstances surrounding the inclusion of these provisions in the Act allow only one possible interpretation; Congress intended to protect economic and other relevant interests. Ultimately, the only way to ensure protection of these interests is by enforcement. It follows, therefore, that Congress intended to permit plaintiffs with economic and other relevant interests to bring an action against the federal government under the ESA, at least with respect to these particular statutory provisions if not for all purposes.

V

PETITIONERS HAVE PROCEDURAL STANDING TO SUE

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, this Court recognized the existence of a procedural right of action.

> We do *not* hold that an individual cannot enforce procedural rights; he assuredly can, so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing.

Lujan v. Defenders of Wildlife, 504 U.S. at 573 n.8 (emphasis in original).

It is apparent from the foregoing that to establish procedural standing under *Defenders*, petitioners must establish (1) that they are persons who have been accorded a procedural right to protect their concrete interests, and (2) that petitioners have some threatened concrete interests that are the ultimate basis of their standing. Put another way, petitioners must seek "to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs." *Defenders,* 504 U.S. at 572.

Under NEPA, petitioners are accorded a procedural right to an Environmental Impact Statement for major federal actions significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(c). Also, the ESA policy that "federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species," 16 U.S.C.

§ 1531(c)(2), accords petitioners a procedural right to consultation before federal agency action.

Respondents have failed to follow these mandated procedures. In consequence of these procedural failures, petitioners have suffered discrete injuries: (1) the restrictions on lake levels imposed in the Biological Opinion adversely affect petitioners by substantially reducing the quantity of available irrigation water; and (2) by imposing restrictions on water levels in Clear Lake and Gerber Reservoirs, the Biological Opinion implicitly determines critical habitat for the endangered suckers. The designation of critical habitat is a major federal action to which NEPA procedural requirements apply. *See* Complaint for Declaratory and Injunctive Relief (Complaint), Paragraphs 21-23.

It is evident that, contrary to the generalized grievance of the environmental groups in *Defenders*, petitioners in this case seek to protect separate, concrete interests. In fact, this case is very much like the situation this Court described in *Defenders* for which this Court would, presumably, find procedural standing.

> There is this much truth to the assertion that "procedural rights" are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case-law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an Environmental Impact Statement, even though he cannot establish with any certainty that the Statement will cause the license to be withheld

> or altered, and even though the dam will not be completed for many years.

Defenders, 504 U.S. at 572 n.7.

In this case, the Ninth Circuit chose not to address the issue of petitioners' procedural standing.

> We note the zone of interests test applies even to plaintiffs who have established constitutional standing premised on a procedural injury. *See Douglas County v. Babbitt*, 48 F.3d 1495, 1500-01 (9th Cir. 1995) (applying the prudential zone of interests test after concluding that the plaintiffs had procedural standing to assert a claim) (citations omitted); *Yesler Terrace Community Council v. Cisneros*, 37 F.3d 442, 447 (9th Cir. 1994) (same). Accordingly, we need not address whether the plaintiffs have procedural, or as it is sometimes known, "footnote seven" standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570-73 n.7, 112 S. Ct. 2130, 2142-2143 n.7. *See also Hazardous Waste Treatment Council v. Thomas*, 855 F.2d 918 n.2 (D.C. Cir. 1989) (explaining that standing may be decided on prudential grounds without first undertaking the constitutional inquiry).

Bennett, 63 F.3d at 917, n.1.

Beyond the identification of a concrete procedural right and an actual threat to that right, the Ninth Circuit has added a third element to procedural standing--the zone of interests. As authority for this proposition, it cites itself.

The lower court does not, because it cannot, rely on any precedent of this Court for its interpretation of procedural standing requirements. The Ninth Circuit merely imposes fresh limitations on the constitutional authority of Congress to allow citizen-suits in the federal courts under environmental statutes for injuries deemed "procedural" in nature.

In *Idaho Farm Bureau Federation*, the Idaho District Court examined the Ninth Circuit precedent on procedural standing, including *Bennett* and *Douglas County*, and frankly concluded the Ninth Circuit never specified the origin of this "zone of interest" requirement. *Idaho Farm Bureau Federation*, 900 F. Supp. 1349, 1361 (D. Idaho 1995). It certainly cannot be inferred from *Defenders*. This Court did not address the issue. However, the issue is easily resolved. The zone of interests test does not apply to procedural standing. A procedural right of action is distinct from a right of action arising from protectable substantive rights found in the zone of interests. The ultimate test is, simply, as this Court stated in *Defenders*, whether petitioners seek "to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs." *Defenders*, 504 U.S. at 572. That this test is satisfied in the present case there can be no doubt.

CONCLUSION

The lower court decision is much more than a proverbial "blank check." It is an invitation to government abuse. Under *Bennett*, the federal government can act (even illegally) with virtually no accountability so long as it acts in the name of species protection. Whatever this Court infers from the language of the Act, it cannot suppose that Congress intended no possibility of redress for illegal government actions by those few individuals who must

shoulder the public burden of species protection. A federal District Court recently recognized the absurdity of this result.

> The court is unwilling to adopt the view that FWS is unrestrained if it cloaks any of its acts in the laudable robe of endangered and threatened species protection. This is a form of totalitarian virtue--a concept for which no precedent has been advanced and which is foreign to the rule of law.

Mausolf v. Babbitt, 913 F. Supp. 1334, 1342 (D. Minn. 1996).

For the foregoing reasons, this Court should overturn the Ninth Circuit decision and allow meaningful application of the ESA citizen-suit provision.

DATED: May, 1996.

Respectfully submitted,

OF COUNSEL
MARK T. GALLAGHER
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888

ROBIN L. RIVETT
*M. REED HOPPER
*Counsel of Record
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Amici Curiae